No. 15729

United States Court of Appeals

For the Ninth Circuit

PLUMBERS & STEAMFITTERS UNION, LOCAL NO. 598,
Appellant,

vs.

W. C. DILLION, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

BRIEF OF APPELLANT

J. DUANE VANCE
Attorney for Appellant.

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BRIEF OF APPELLANT

A. JURISDICTION

This is an appeal by the defendant below, Plumbers and Steamfitters Union Local No. 598 (hereinafter called Plumbers Local 598 or Local 598) from a judgment against it in favor of the appellee, W. C. Dillion, in the sum of $30,000, rendered by the United States District Court for the Eastern District of Washington, Southern Division.

Jurisdiction of the court below is claimed under Section 301 of the Labor Management Relations Act of 1947 (29 USC § 185) (Tr. 4).

Jurisdiction of this court to review is based upon 28 USC § 1291.

B. STATEMENT OF THE CASE

Plaintiff's amended complaint, on which the case was tried (Tr. 3-12), named as defendants in addition to the appellant three individuals who were officials of

the appellant union, to-wit: Cape, Beames and Lawson, and also three individual defendants who were engaged in the plumbing and heating business in the Tri-City (Pasco, Kennewick, Richland) area in Washington, to-wit: Head, Mokler, and Randolph. The amended complaint contained two causes of action. The first cause of action, on which the plaintiff asked for and was granted judgment against only the appellant union, was for breach of contract. The plaintiff alleged that prior to and about November 22, 1954, he had been desirous of establishing a pipe fabricating and installing and pipeline contracting business in the Tri-City area and that the officers of the appellant union were aware thereof (Tr. 4-5). Plaintiff further alleged that he did establish himself in a pipe fabricating and installing business and that 40 per cent of such pipe *as would be* fabricated and installed by plaintiff would have to be obtained from without the state of Washington (Tr. 5-6).

Plaintiff further alleged that on November 22, 1954, he entered into a contract with the appellant union referred to as Exhibit A (which became plaintiff's Exhibit 14 at the trial), under the terms of which contract by inference or implication the appellant union was required to furnish the plaintiff with employees (Tr. 6). Plaintiff claimed that the defendant arbitrarily refused to furnish such men to the plaintiff, and thereupon breached the agreement (Tr. 7).

Plaintiff alleged that he had obtained a contract for work (Tr. 5) and that the union had furnished him two men for a period of 48 hours (Tr. 8) whereby plain-

tiff became and was an employer within the meaning of the Labor Management Relations Act of 1947 (Tr. 8). Plaintiff claimed damages in the sum of $50,000.

In his second cause of action the plaintiff complained against all of the defendants that they had combined and conspired to eliminate the plaintiff as a competitor in the pipe fabricating and pipeline business in the Tri-City area in the state of Washington, in violation of the Sherman Anti-Trust Act and prayed for $50,000 damages to be trebled (Tr. 9, 10, 11).

At the close of the plaintiff's case, all defendants moved for dismissal and for a directed verdict by reason of the insufficiency of the evidence in general (Tr. 159-168) and specifically on the insufficiency of the evidence to establish interstate commerce to warrant jurisdiction of the court (Tr. 163). The court granted the motion for directed verdict on the second cause of action; that is, the action based upon the Anti-Trust Law (Tr. 169-181). Accordingly, verdict and judgment in favor of the defendants on the second cause of action was entered (Tr. 31, 32) and no appeal was taken therefrom, and that matter is in no way now before the court.

The appellant union answered the first cause of action (on breach of contract) generally admitting the description of the parties, and the contract identified as Exhibit A (subsequently plaintiff's Exhibit 14), denying commerce and the jurisdiction of the court based thereon (Tr. 20, 21) and setting up as a fifth defense the defense of illegality of the contract sued on, pleading, *inter alia,*

"The alleged collective bargaining agreement set forth in the Amended Complaint is illegal and void and contrary to public policy in that plaintiff and defendant union agreed to and enforced and maintained and attempted to enforce and maintain a collective bargaining agreement, including among other things, Section 3 thereof, a provision reading as follows:

" 'Hiring and Discharge

" 'Section 3. The employers agree to hire all employees covered by this agreement from and through the unions and to retain in its (*sic*) employ only members in continuous good standing in the unions. This is to include foremen, general foremen and superintendents.

" 'The employers agree to forthwith discharge any employee upon written notice from the union that such employee is not in good standing in the union.'

"That by reason of executing such a collective bargaining agreement and thereafter attempting to enforce and maintain said collective bargaining agreement, the plaintiff and defendant local union did engage in unfair labor (18) practices within the meaning of Section 8 (a) (3) and Section 8 (b), subsections (1) (A) and (2) of the National Labor Relations Act as Amended (61 Stat. 136)." (Tr. 25, 26)

The quoted language is from Exhibit 2, incorporated by reference into Exhibit 14.

At the close of plaintiff's case motions to dismiss, as stated above, were made by appellant union (Tr. 159, 163). The court, in the interest of saving time, prior to argument indicated a ruling adverse to the appellant

on the question of illegality of the contract (Tr. 167, 168) and, after argument, denied the motions on the breach of contract cause. At the close of all of the evidence, appellant union again moved for dismissal on the ground of the insufficiency of the evidence and the illegality of the contract in question (Tr. 181) and this was denied (Tr. 181). Verdict was rendered against the appellant on January 18, 1957, in the sum of $40,000 (Tr. 32). Motions for judgment notwithstanding the verdict or for a new trial were filed by the appellant union on January 25, 1957 (Tr. 33, 34). These motions were heard on the 7th day of June, 1957, and the court, by its order dated June 12, 1957, ordered a new trial unless the plaintiff consented to *remittitur* of $10,000 (Tr. 35, 36). Such a consent to *remittitur* was filed (Tr. 36, 37) and this appeal followed by notice on July 5, 1957 (Tr. 37).

For the purposes of this appeal, it was established by the jury's verdict upon controverted evidence that appellant union refused to furnish available men to the plaintiff. There being evidence upon which the jury could so find, appellant union treats this herein as an established, but not admitted, fact.

Plaintiff had only one contract and the case substantially arises from the cancellation of this contract by the general contractor because of the plaintiff's inability to complete the same. It is therefore, necessary to describe the relationships involved in this contract.

The prime contract of the general contractor, Lewis Hopkins, was for the construction of what is known as an outfall line at the Hanford Project of the Atomic

Energy Commission (Tr. 231, 232). This is a structure designed to discharge radioactive waters into the Columbia River (Tr. 231, 232). A building called a surge chamber about the size of a small two-story house of concrete construction was built about 90 feet from the river. About 700 feet of pipe of 66-inch diameter and ½-inch thickness is laid into the river leading the radioactive water into the middle of the Columbia River (Tr. 232, 233). This pipe was furnished by the Atomic Energy Commission at the job site (Tr. 71, 453). The government prepared a fair cost estimate before it let the bids. The fair cost estimate of the prime contract which was let to the Lewis Hopkins Company (Tr. 237, 238) was $125,000. The bid of the Lewis Hopkins Company was $137,777 (Tr. 238). The government's fair cost estimate of the mechanical contractor's portion of the contract was $25,000 (Tr. 29). That covered the bringing of the 90 feet of pipe from the surge chamber to the river bank and putting the 700 feet of pipe out into the middle of the river (Tr. 239, 240). Included in the fair cost estimate was the sum of 10 per cent for profit, so the government figured the profit on the mechanical contract portion at approximately $2500, although it is a little bit more since 10% for profit allows 10% for profit on the usual 10% for overhead (Tr. 269).

The notice to proceed by the government to the Hopkins Company was issued on November 17, 1954, and received by Hopkins on November 19, 1954 (Tr. 254) and the contract was to be completed within 120 days after such notice (Tr. 254, 255).

Lewis Hopkins, d/b/a Lewis Hopkins Company,

awarded the subcontract for the mechanical construction to the plaintiff, Dillion (Plaintiff's Exhibit 18) (Tr. 85). Although undated, it was actually signed on the 23rd or 24th of November (Tr. 89), and was not to be effective unless the plaintiff secured a contract with the union (Tr. 89). Likewise, the designation of the percentage for overhead and profit was never filled in on Exhibit 18. Plaintiff testified that it was to be 25 per cent (Tr. 88). This, of course, was overhead *and* profit. It was a time and material contract. On December 4, 1954, some eleven days after granting the contract to Dillion, Lewis Hopkins cancelled the contract because of the inability of the plaintiff to perform (Exhibit 53) (Tr. 100). Dillion was paid in full for his work and expense to that time (Tr. 100, Exhibit 32). Hopkins thereafter employed the firm of Thorn and Marble, who did the same work as Dillion would have done under the contract (Tr. 101). Thorn and Marble did exactly the same work that Dillion would have done under the contract (Tr. 100, 660). The materials and labor furnished by Thorn and Marble, as would have been furnished by Dillion, is shown by Exhibit 54 (Tr. 102). Hopkins paid Thorn and Marble approximately $13,-700, inclusive of overhead and profit (Tr. 103). Dillion testified he would have done the work just as well as Thorn and Marble and in the same way (Tr. 93). He could have done it just as neat and just as cheaply (Tr. 93).

The plaintiff-appellee is a journeyman member of the appellant Union and has been since about 1942 (Tr. 281). He had been planning for some time to go into

business (Tr. 282), and first talked to representatives of the appellant union around June or July of 1954 and then again in September, 1954 (Tr. 285). Plaintiff leased some space at the Pasco Airport for a shop in September or October (Exhibit 9, Tr. 63), and got a telephone (Exhibit 8, Tr. 63). He got the miscellaneous licenses, business cards, and checkbooks necessary for the purpose (Tr. 64, 65). He had started acquiring some tools and equipment prior to that time. He procured a winch truck in a trade (Tr. 65), and had procured two welding machines, pipe dies and pipe wrenches, etc. (Tr. 65). One of the welders cost $337.50 (Tr. 82), the other about $300 (Tr. 82). On the basis of his shop and his contract with Hopkins, he obtained his contract with the Union (Exhibit 14) November 23, 1954 (Tr. 92). When his contract was cancelled by Hopkins on December 4, he closed up and sold his equipment and made no further effort to continue in business (Tr. 81). According to counsel's summation to the jury (Tr. 186-194), Dillion's damages were as follows:

Bond premium, payroll checks, phone, rent, insurance, etc. (Tr. 189, 190)	$ 207.58
Traveling and time acquiring equipment, materials and making contacts in the business:	
Mileage	300.00
Time (Tr. 190)	2,500.00
(It is to be noted this includes the making of contacts for the procuring of other business, none of which he ever secured) (Tr. 87, 88, 93, 94)	
Percentage to be paid plaintiff on the Hopkins contract, $5,750 (Tr. 192)	
Figuring fifty per cent of this figure for overhead and 50 per cent for profit, we deduct one-half of $5,750	2,875.00

All of the equipment purchased for the business, $3,069.50, less sales of portions thereof, $2,350 (Tr. 192) 1,719.50

$7,602.08

As to damages the court instructed the jury as follows:

"In accordance with the general principles governing the allowance of damages, a party to a contract who is injured by its breach is entitled to compensation for the injuries sustained and is entitled to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed. The measure of damages for the breach of the agreement between the defendant union and the plaintiff is the amount which would have been received if the contract had been kept, which means the value of the contract, including the profits and advantages which are its direct results and fruits. A recovery may be had both for gains prevented and losses sustained by reason of the breach, including the loss of prospective profits and the plaintiff's loss of time while engaged in the performance of the contract.

"It is not necessary that you determine the amount of the damages to the exact dollar and cents figure, a reasonable estimate is sufficient, but the amount should be based on the evidence and not on speculation or conjecture on your part.

"In an action for damages for breach of contract, the fundamental principle is full compensation for the wrong done. The general rule is that compensation shall be equal to the injury. The breach is the measure by which the compensation is to be measured, and all that the law requires is

that such damages be allowed as in the judgment of fair men and women directly and naturally resulted from the breach.

"Now, if your verdict should be for the plaintiff, *you may not properly include in the amount awarded supposed or claimed profits which the plaintiff might have received from contracts other than the Hopkins contract. Profits of the latter nature would be wholly speculative and/or conjecture and not supported by the evidence in the case.*" (Tr. 207, 208) (Emphasis supplied)

Plaintiff's counsel took no exceptions to the damage instructions (Tr. 212-218).

There is not one syllable of evidence in the record that the plaintiff ever purchased or transported anything in interstate commerce, or that he would have in the performance of the Hopkins contract, purchased or transported anything in interstate commerce, or that Thorn and Marble who did the work exactly as plaintiff would have under this contract, and furnished the same materials as plaintiff would have under this contract, purchased or transported anything for this contract in interstate commerce. All steel pipe over 24 inches in diameter is shipped in from outside the state of Washington and had plaintiff actually been engaged in the fabricating business—as distinguished from installation work such as called for by the Hopkins contract—he would have furnished such pipe (Tr. 90-91).

No steel pipe is actually manufactured within the State of Washington (Tr. 43).

C. SPECIFICATION OF ERRORS

The appellant contends that the District Court erred as follows:

(1) In failing to grant appellant's motion to dismiss made at the close of plaintiff's case and renewed at the close of all of the evidence and in failing to grant judgment notwithstanding the verdict on two grounds:

(a) The evidence failed to show the existence of interstate commerce within the meaning of the Labor Management Relations Act of 1947 (29 USC 151 ff) to establish the jurisdiction of the District Court and therefore the court was without jurisdiction; and

(b) The contract on which the plaintiff sued was illegal, contrary to public policy and void and no action can be maintained thereon.

(2) In refusing to grant the appellant a new trial on the ground that the verdict of the jury was so grossly excessive under the applicable law and the instructions of the court as to be not supported by any evidence.

D. SUMMARY OF ARGUMENT

The burden of establishing the facts essential to the jurisdiction of the District Court rested upon the plaintiff and in this case upon proof of interstate commerce within the meaning of the Labor Management Relations Act of 1947 (29 USC, §§ 151, 152). There was an utter failure of proof that the plaintiff ever engaged in interstate commerce or would have engaged in interstate commerce in the performance of the contract which he had. The jurisdiction of the court cannot be

based upon a claim of commerce in proposed future activities of the plaintiff that were speculative.

The contract between plaintiff and defendant was one clearly made illegal by the Labor Management Relations Act of 1947 (29 USC §§ 157, 158) and is contrary to the public policy of the United States in that the same contained an illegal closed shop section and therefore neither party thereto may bring an action for its breach and in particular where, as here, the breach, if any, of the agreement involved the very subject which the illegal portion of the contract covered, to-wit: hiring and furnishing of men.

As to damages, assuming that view of the evidence most favorable to the plaintiff, there was no evidence, which under the applicable legal measure of damages or the court's instructions thereon on which plaintiff could recover more than about one-fourth of the total verdict. Therefore the verdict should have been set aside and the appellant granted a new trial.

E. ARGUMENT

I.

The Evidence Failed to Show the Existence of Interstate Commerce Within the Meaning of the Labor Management Relations Act of 1947 (29 USC 151 ff) to Establish the Jurisdiction of the District Court and Therefore the Court Was Without Jurisdiction

It is axiomatic that the jurisdiction of the Federal Court must be clearly and affirmatively shown. 54 Am. Jur., Court, §§ 136, 137, 138, 139, 140. *Thomas v. Ohio State University Trustees,* 195 U.S. 207, 49 L.Ed. 160.

The cause here involved is based clearly and entirely on the Labor Management Relations Act (Tr. 4, par. II) which is in turn based on the commerce power of Congress. 29 USC §§ 151, 152.

The appellant specifically called the court's attention to the lack of proof of commerce in the motion to dismiss or for directed verdict at the close of plaintiff's case in the following language (Tr. 163):

> "In both causes of action the court's jurisdiction rests upon the jurisdictional statute relating to acts based upon commerce and insofar as the acts, both statutes involve (*sic,* involved) the antitrust act and the Labor Management Relations Act which are both bottomed on commerce, of course, my motion would go as well to the insufficiency of the evidence to sustain the jurisdiction of the court on commerce."

This motion was renewed at the close of all the evidence (Tr. 181).

The complaint indicated that the plaintiff-appellee did not rely upon any actual commerce. In the complaint, the plaintiff alleged (Tr. 5-6):

> "Such pipe as *would be* fabricated and installed by plaintiff * * * he would be required * * * 40 per cent of which * * * *would have to be* obtained from without the state of Washington * * *. In such business plaintiff *would be* fabricating and installing pipe, carrying liquids and gases across state lines, etc." (Tr. 5-6) (Emphasis supplied)

The plaintiff never purchased anything in interstate commerce—he never sold anything in interstate commerce.

In the performance of the Hopkins contract, he

would not have been required to purchase any material in interstate commerce and since pipe was furnished on the job site and the job was primarily a labor job would not have furnished any substantial quantity of material, which might or might not have come in interstate commerce (Tr. 173). (The total material furnished by the mechanical contractor was less than $500 (Ex. 54) and hence *de minimis* assuming that it came in interstate commerce, which was not proved.) The plaintiff would not have sold any goods in interstate commerce under the Hopkins contract since it was an installation job on the project.

The plaintiff never had any other contract for work and there was no evidence that he performed any work or had agreements to perform work or agreements to purchase or sell materials from or to any persons other than in connection with the Hopkins contract (Tr. 58-95).

Assuming Congress exercised its full power in the Labor Management Relations Act, the above-stated posture of the facts puts plaintiff's activities outside the regulatory power of Congress, as shown by *Fairway Foods Inc. v. Fairway Markets Inc.* (9th Cir. 1955), 227 F.(2d) 193, where this court said:

> "While it is thought that activities which in isolation might be deemed local, may affect commerce due to interlacings of business across state lines, in the absence of a showing that the business is part of a coordinated interstate system substantially affecting commerce, the activities of retail grocers purchasing and selling their wares exclusively intrastate are not a permissible field for

Congressional regulation under the commerce power."

In *Groneman v. I.B.E.W.* (10th Cir.) 177 F.(2d) 995, an action was brought by a carpentry contractor who purchased for the particular contract out of which the dispute arose some $6,000 worth of materials in interstate commerce. The court stated the question as follows at page 997:

> "Assuming then that this labor dispute was unlawful and that it interrupted commerce to the extent of $6,000, can it be said that this has such an effect upon commerce as is sufficient to give the court jurisdiction under the Act * * * (citing *NLRB v. Fainblatt,* 306 U.S. 601, 83 L.Ed. 1014)

The court said:

> "Considered in the light most favorable to appellant the impact of this labor dispute upon commerce, in any event, is so trifling and microscopic as to bring it within the above pronouncement by the Supreme Court and requires the application of the *de minimis* doctrine."

Of course, had the plaintiff become a large-scale pipe fabricator and/or pipeline contractor he would have been engaged in interstate commerce and the mere fact that his investment was limited to some $3,000 is not enough to negate this event. However, this event was at best a speculative possibility and is not sufficient to warrant the jurisdiction of the court. The trial court itself in this connection said (Tr. 172):

> "As I think I indicated in my remarks from the bench here, I can't see where the Hopkins contract could possibly involve a restraint of interstate commerce as it is defined for purposes of the Sherman Act in the decisions.

> "The pipe was furnished; all that the contract called for was welding it and putting it into place; and I thought it was very significant the length to which counsel for the plaintiff was required to go in trying to meet the court's objections or comments from the bench in suggesting that the supplies that were used in welding pipe could be the subject of substantial interstate commerce which would be restrained in this case."
>
> * * * (Tr. 173): "I don't think that future intentions of one engaged in an industry can be regarded as actually affecting interstate commerce * * *."

It is not clear where or how the court justified its jurisdiction under the Labor Management Relations Act in the face of these pronouncements from the bench.

Carrying out this thought the court instructed the jury specifically that as to damages they could allow no recovery for any loss of profits on any contract or job other than the Hopkins job because to do so would be "wholly speculative and/or conjecture and not supported by the evidence in the case (Tr. 208)." By failure to object plaintiff's counsel acquiesced in this proposition. Appellant respectfully submits that it is equally speculative and/or conjecture that there was or would be any contracts involving commerce. Naturally, every self-employed machinist hopes ultimately to be a second General Motors, and every chemist a DuPont, but these aspirations and hopes do not open the doors of the Federal Courts to their grievances on the ground that they hope to be in commerce nor does it erase the demarcation of our Federal system between Federal and state regulation. Since hope springs eter-

nal, to give such broad effect to it, would be to do what the United States Supreme Court said could not be done in these words:

> "effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB v. Jones and Laughlin Steel Corp.,* 301 U.S. 1, 81 L.Ed. 983, quoted by this court in the *Fairway Foods* case, *supra.*

Appellee is not shorn of his substantive rights by reason of the non-accessiblity of the Federal Court, for labor unions may sue and be sued in their own name as legal entities in the state of Washington, *Pacific Typesetting Co. v. I.T.U.,* 125 Wash. 273, 216 Pac. 358, nor has the statute of limitations run on his claim. *McDonald v. Wockner,* 44 Wn.(2d) 261, 267 P.(2d) 97.

II.

The Contract on Which the Plaintiff Sued Was Illegal and Void and No Action Can Be Maintained Thereon

Section 3 of the Washington State Agreement (Exhibit 2) which was incorporated by reference into plaintiff's contract (Exhibit 14) required all employees to be hired through the appellant union—including supervisors—and provided for immediate discharge of all employees not in good standing with the union. Such a provision constituted a "closed shop" and is clearly illegal under the Labor Management Relations Act. *NLRB v. Alaska Steamship Company* (C.A. 9), 211 F.(2d) 357; *NLRB v. NMU,* 175 F.(2d) 686.

In *Lewis v. Jackson and Squire,* 86 F.Supp. 354 (appeal dismissed, 181 F.(2d) 1011), an action was

brought by the trustees of a welfare fund to collect payment of the contributions by the employers thereto as required by the collective bargaining agreement. A defense was that the collective bargaining agreement contained an illegal hiring provision. In dismissing the action, the court said:

> "This action of the union conclusively demonstrates that the union shop provision was deemed absolutely essential. It follows, therefore, that the unlawful union shop provision, an essential and inseparable part of the agreements, taints and renders unenforceable all parts of the agreements, including, of course, the provisions relating to payments to the welfare and retirement fund. Also, due to the public interest involved, the defendants may assert the defense of illegality of the agreements even though they were parties thereto."

Local Union No. 420 v. Carrier Corp., 130 F.Supp. 26, involved a contract by a local union of plumbers wherein the employer agreed that certain work would be subcontracted only if members of the plaintiff local did the work. The employer refused to comply with this provision and subcontracted work to a subcontractor who assigned the work to members of another union. The plaintiff union sought damages for this breach. The employer maintained that the contract was illegal under Sec. 8 (b)(4)(D) (29 USCA Sec. 158). (The illegality here arises under Sec. 8 (a)(3)). The court granted a motion for dismissal on the pleadings, saying:

> "The very thing contemplated by (the clause) in the collective bargaining agreement upon which plaintiff leans is that specifically denoted an unfair

labor practice by Section 8 (b) (4) (D) of the Act. The Board not only found this particular section of the contract 'illegal insofar as it provides that the undisputed rigging work will be done only by mmebers of Local 40' but that the 'fabric of illegality' ran 'through the entire contract.'

"Having in mind the finding of the Board, with which I am in complete accord, and the subsequent injunctive proceedings in this court with its affirmance by the Court of Appeals, there is not the slightest doubt in my mind but that the motion to dismiss must be granted because *the action is based upon an illegal and unenforceable contract.*"

Local No. 234 of the Plumbers' Union v. Henley & Beckwith, Inc. (Fla. 1953) 66 So.(2d) 818. There a contract very much like the one in issue here was entered into by the plaintiff employer and the defendant union prior to the proscription of closed shop contracts by the Labor Management Relations Act of 1947. It was, however, in contravention of the law of the state of Florida which prevented union security clauses of any kind. The employer brought an action for declaratory judgment. The union's motion for dismissal was granted on the ground that the union security clause was violative of the public policy of the state of Florida and that the hiring provisions were indivisible from the remaining portions of the contract and hence the entire contract was void and unenforceable at the instance of the employer.

The Supreme Court of the state succinctly stated the question as follows, at page 820:

"Two questions are presented in this proceeding: (1) Whether Article 7 of the contract is vio-

lative of the public policy of this state because it attempts to create a closed shop status between the union and the employer; and (2) Assuming that Article 7 is a provision for a closed shop, *whether it renders the whole contract void.*" (Emphasis supplied)

After finding the violation of public policy, the court said as follows at page 821:

> "Consequently, the contract to which Article 7 applies must fall unless it can be said from a fair construction of the contract that Article 7 can be severed therefrom without doing violence to the intentions of the parties as to the remainder."

Then the court discussed at length at page 821 the rules applicable to the determination of whether or not such contracts are divisible or entire. The court held that the contract there, which was in principle the same as the contract here, was indivisible and void in its entirety, saying at page 822:

> "Thus, it appears that in the contract a set of promises on one side is exchanged for a set of promises on the other; and it is impossible to conclude that the very significant promise on one side, namely the closed shop agreement appearing in Article 7, can be entirely eliminated from the contract and still leave a valid working arrangement fairly reflecting the original mutual understanding between the parties."

The court also said at page 823:

> "Agreements in violation of public policy are void because they have no legal sanction and establish no legitimate bond between the parties. *Brumby v. City of Clearwater, supra.* Because of this the defendant may assert the invalidity of the contract even though he is a participant in the wrong."

On the motion to dismiss, the trial court indicated that he felt the union could not now raise the question of the illegality of the contract because of something in the nature of an estoppel. The court said (Tr. 168):

> " * * * I don't like to base it on the principle of estoppel, but maybe a second cousin to it. I don't think they should be permitted now to say, 'This contract, which we gave you and which we required you to take and which you had to have in order to perform your contract, we now claim that there was an illegal provision in it and we are going to take advantage of that illegal provision and prevent you from recovery'."

The union in entering into such an illegal agreement was not entering into an agreement from which it could suffer no penalty and thereby sit back and claim or not claim the benefit thereunder as it saw fit. Such agreements are so contrary to public policy as set forth in the Labor Management Relations Act that the union subjected itself to the possible imposition of substantial penalties by entering thereinto.

The union or the employer or both may be required, by an NLRB back-pay award, to make whole any person suffering loss by reason of discrimination in employment arising out of such a contract. *NLRB v. Alaska Steamship Co.* (C.A. 9) 211 F.(2d) 357.

In enforcing the Act in such particulars the NLRB is acting only to effectuate public policy and not vindicate private rights: *Haleston Drug Stores v. NLRB* (C.A. 9) 187 F.(2d) 418, cert. denied, 342 U.S. 815. This illustrates the degree to which public policy is involved.

Ordinarily the existence of a contract of reasonable

duration will bar an election at the behest of another union seeking to represent the same employees but the Board has consistently held that where such an existing contract contains an illegal union security clause, as here, it will not be such a bar. *Seaboard Terminal & Ref. Co.,* 109 NLRB 1094; *Ira Grob, Inc.,* 110 NLRB 626; *Kaye Novelty Co.,* 107 NLRB 26.

To further illustrate the public policy involved and the extent to which the union exposes itself by the execution of such an agreement, the Board may and has adopted the principle of requiring the reimbursement of all dues and other charges collected from its members pursuant to such a contract. See Twenty-first Annual Report of the NLRB 1956, pages 103, 106, and *United Association of Plumbers, etc.,* 115 NLRB 594

There can be no question therefore that contracts containing such provisions are totally void.

In 17 C.J.S., Contracts, Secs. 277 and 280, pages 668 and 669, it is stated as follows:

> Sec. 279-a: "Ordinarily illegal contracts may not be validated by ratification.* * * "
>
> b: "Waiver. The defense of illegality cannot be waived.* * * "
>
> c: "Estoppel. Illegal contracts cannot be validated by the invocation of an estoppel.* * * "
>
> "An agreement void as against public policy or because prohibited by law cannot be rendered valid by invoking the doctrine of estoppel.* * * "

III.

The District Court Erred in Refusing to Grant the Appellant a New Trial on the Ground that the Verdict of the Jury Was So Grossly Excessive as To Be Not Supported by Any Evidence

The instruction of the trial court as to damages was not excepted to by either party and therefore became the law of the case. We therefore refer here to the instruction of the court in that regard (Tr. 207, 208):

> "In accordance with the general principles governing the allowance of damages, a party to a contract who is injured by its breach is entitled to compensation for the injuries sustained and is entitled to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed. The measure of damages for the breach of the agreement between the defendant union and the plaintiff is the amount which would have been received if the contract had been kept, which means the value of the contract, including the profits and advantages which are its direct results and fruits. A recovery may be had both for gains prevented and losses sustained by reason of the breach, including the loss of prospective profits and the plaintiff's loss of time while engaged in the performance of the contract.
>
> "It is not necessary that you determine the amount of the damages to the exact dollar and cents figure, a reasonable estimate is sufficient, but the amount should be based on the evidence and not on speculation or conjecture on your part.
>
> "In an action for damages for breach of contract, the fundamental principle is full compensation for the wrong done. The general rule is that

compensation shall be equal to the injury. The breach is the measure by which the compensation is to be measured, and all that the law requires is that such damages be allowed as in the judgment of fair men and women directly and naturally resulted from the breach.

"Now, if your verdict should be for the plaintiff, you may not properly include in the amount awarded supposed or claimed profits which the plaintiff might have received from contracts other than the Hopkins contract. Profits of the latter nature would be wholly speculative and/or conjecture and not supported by the evidence in the case."

Appellants' position is that there is *no* evidence in the case, which, under that instruction, would warrant the verdict of $40,000 or the judgment of $30,000 after the filing of the *remittitur*.

We turn to counsel's summation to the jury for the view of the evidence on damages most favorable to the plaintiff (Tr. 190-193). First he claims miscellaneous expenditures for insurance, payroll checks, phone, rent, etc., $207.58. He then claims expenses of travel of 3,000 miles at 10 cents a mile, and 500 hours at 5 dollars an hour for going around making business contacts (Tr. 190). Then he claimed profit under the contract at 25% of an estimated gross of $23,000, or the sum of $5,750. He had purchased $3,069.50 worth of equipment which he sold part of for $2,350 for loss of $1,719.50. This would come to a total loss to plaintiff of $10,477.08. On what could the jury possibly give the plaintiff an additional sum of nearly $30,000?

Not essential to this argument but as a makeweight

it should be pointed out that not all of the 25 per cent would be profit for overhead has to be computed at probably 10 per cent or $2,300, if the $23,000 figure were accepted. It is probably also true that the conclusive evidence of the actual gross value of the contract by which the plaintiff is bound is the sum of less than $14,-000 paid to Thorn and Marble for its actual execution since plaintiff himself testified he could have done it as cheaply and well as they. If this figure were accepted his profit would be $3,500 less overhead of 10 per cent, or $1,400, or a net of $2,100, rather than the $5,750 suggested by counsel.

But for the purposes of this argument, passing these points, and assuming the over-all total of $10,477.08, what additional item or items of damages are there for which the plaintiff may be compensated? Appellant submits there are none. There is no catch-all in a breach of contract action and juries are not permitted to simply pull general figures out of the air. Courts are accustomed to personal injury actions wherein there is always a claim for pain and suffering by way of general damages and there may be some tendency to permit such evaluations erroneously to carry over into contract actions. The trial court intimated in conference that possibly the loss of business was an over-all item (Tr. 183). Such, however, was not carried over into the instructions to the jury where counsel could properly except (and it would have been error, as hereinafter shown) and there was nothing in the damage instruction as quoted above which would warrant the jury in awarding to the plaintiff any sum whatsoever for loss

of business. The plaintiff was in business only from the time of his contract on November 23, 1954, to December 4, 1954, a period of some 10 or 11 days. He had no regular and established business. The only business he had was the Hopkins contract. In recognition of this, the court specifically instructed the jury that they could not award the plaintiff anything by way of loss of future profits for the reason that the same would be wholly speculative and conjectural. It is respectfully submitted that this was correct, as well as being now the law of the case for want of exception, and that to allow any recovery for "loss of business" would be contradictory thereto and would be to allow the jury in fact to give the plaintiff recovery for loss of profits. The only monetary value of "loss of business" is "loss of profits" and as will be shown, the cases and authorities treat them as interchangeable. 25 C.J.S., Damages, § 90 b, p. 633, says as follows:

> "Where *a regular and established business* is injured, interrupted, or destroyed, the measure of damages is the diminution in value of the business by reason of the wrongful act, *and in order to establish the diminution in value, it is necessary to show the usual profits from the business.* Hence, the rule has been announced that, where an established business had been interrupted, *the measure of damages is the loss of profits,* together with such expenses as continue while the business is interrupted." (Emphasis supplied)

The same authority says in the same volume at page 811:

> "A party claiming to have been wrongfully prevented from completing a contract may introduce

> evidence as to his expenditures for work and materials in part performance, and, in connection with loss of profits, the probable cost to him of completing the contract, and the amount bid by a third party to complete the job. Where plaintiff has an *established business,* evidence of the *expenses and income of such business for a reasonable time before the interruption of such business* is admissible as a basis for estimating future profits." (Emphasis supplied)

Likewise the same authority says at page 831:

> "There can be no award of damages for breach of contract where there is no proof that damages have been sustained by the breach or no evidence by which the amount of damages can be measured, except, in some cases of nominal damages."

A tort action involving a claim for damages similar to those here claimed was involved in *U.S. v. Griffith, Gornall, and Carman, Inc.,* 10 Cir. 210 F.(2d) 11. In that case the plaintiff was a corporation engaged in doing construction work. It had a contract with a city to lay a water pipe for $43,000. The pipeline crossed land adjacent to an Air Force base. The United States Government was negligent in the maintenance of the Base, causing plaintiff's work to be flooded with substantial loss to him and he brought an action under the Federal Tort Claims Act, claiming that his business was destroyed. The trial court allowed him a figure of $15,000 for "injury and impairment of business, loss of earnings, destruction of credit, and reduction of net worth." This latter amount was disallowed by the Court of Appeals on the ground that there was no substantial

evidence to sustain the judgment. The court said at page 13:

> "In a tort action, damages for the loss of profits and for injury to or interruption of a business, will be allowed only when they can be established with reasonable certainty and are the proximate result of the wrong complained of. No recovery can be had for such losses if they are uncertain, conjectural, or speculative. 15 Am. Jur., Damages, §§ 150, 157.
>
> "Prospective profits are necessarily somewhat uncertain and problematical, but in cases where damages are definitely attributable to the wrong of the defendant and are only uncertain as to amount, they will not be denied even though they are difficult of ascertainment. (Citations) *The loss of future profits from a regularly established business may in proper cases be established by showing that the profits after the wrong are less than past profits.* (Emphasis supplied)
>
> * * * (Citations) * * *
>
> "This is often the only available evidence. The fact of damage, however, must be proved to a certainty. Mathematical exactness as to the amount is not required but the evidence must form a basis for a reasonable approximation. The court must have before it such facts and circumstances to enable it to make an estimate of damage based upon judgment, not guesswork."

The Court of Appeals further said at page 14:

> "There was no evidence of any particular jobs which the plaintiff might have bid upon, or that it would have been the low bidder if it had so bid; or that the jobs would have been profitable contracts if it had been the successful bidder. No evi-

dence was introduced to show that the plaintiff had been denied bond or had inquired of any surety company or others if a bond would be furnished if it were a successful bidder at a contract letting or for other contracts which might have been obtained. Plaintiff's testimony indicates that it did not operate the year round; and that weather conditions controlled its operations materially. No evidence was introduced to show that weather conditions would have permitted work if it had been a successful bidder or obtained a sub-contract. *What the loss of profits or damage to plaintiff's business would have been, if any, is pure guesswork on the part of plaintiff's president and far too speculative to sustain a judgment for this claim.''* (Emphasis supplied)

In that case the plaintiff at least had an established business to be damaged. The fact that the United States Government was the defendant does not make the measure of damages or degree or nature of required proof any different than in this case where a union is the defendant.

There being no evidence to sustain the verdict, the court committed an error of law in failing to grant appellant a new trial. *Southern Pacific v. Guthrie* (9 Cir.) 186 F.(2d) 926. Evidence to support a verdict must be substantial. *State of Washington v. U.S.* (9 Cir.) 214 F.(2d) 33, 41.

In such a case *remittitur* as imposed by the trial court is not adequate. *Ford Motor Company v. Mahone,* 205 F.(2d) 267.

The matter of loss of good will as an item of general damages was considered at length by the California Su-

preme Court. *Stott v. Johnston,* 36 Cal.(2d) 864, 229 P.(2d) 348. That was an action by a painting contractor against his supplier for furnishing him with defective paint which caused loss and damage to his business. It is interesting to note that he produced testimony of his net earnings for three years immediately preceding the loss. The court stated as to the allowance of a loss for good will:

> "Analogous considerations have arisen in cases where recovery for loss of future profits was sought."

The court then cites with approval and with emphasis added from an earlier case, as follows:

> " 'Where the operation of an *established* business is prevented or interrupted, as by a tort or breach of contract or warranty, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales'."

It is respectfully submitted that it is conclusively established that the jury, either through sympathy for the plaintiff or prejudice against the appellant, failed either to follow the court's instruction or the evidence, and that under the law both generally and as established in this case by the instructions of the court, there is no evidence to sustain the jury's verdict, and therefore the court erred in denying the appellant a new trial. As further suggested in *Ford Motor Company v. Mahone, supra,* where the prejudice or sympathy of the

jury is established by its erroneous damage award, the verdict on the controverted liability questions is likewise infected and the only remedy is by a new trial on both issues.

F. CONCLUSION

Appellant respectfully submits that the judgment of the court below should be reversed and the case dismissed for failure of proof of interstate commerce justifying the imposition of the Federal law and/or the jurisdiction of the Federal Court and on the further ground that the contract on which the plaintiff sued was illegal, contrary to public policy and void and no action could be maintained thereon, or that alternatively, should the court rule contrary to appellant on those points, the judgment of the trial court should be reversed with instructions to grant to appellant a new trial.

Respectfully submitted,

J. Duane Vance
Attorney for Appellant.

APPENDIX A

MATERIAL PORTIONS OF LABOR-MANAGEMENT RELATIONS ACT OF 1947

Title 29, U.S.C.A. §151. Findings and declaration of policy.

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or in-

terruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. As amended June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, §101, 61 Stat. 136.

Title 29, U.S.C.A. §152. Definitions.

When used in this subchapter—

* * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or

any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * *

Title 29, U.S.C.A. §157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title. As amended June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, §101, 61 Stat. 140.

Title 29, U.S.C.A. §158. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this sub-chapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 158 (a) of this title as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 159 (e) of this title the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (a) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (b) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

Title 29, U.S.C.A. §185. Suits by and against labor organizations—Venue, amount, and citizenship.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

APPENDIX B

LIST OF EXHIBITS

Ex. No.	*Identified*	*Offered*	*Admitted*	*Rejected*	*Other*
1					
2	76		50		
3	48	48	48		
4	4	4		4	
5	62 & 64		64		
6	63		63		
7	63		64		
8	63		63		
9	63		63		
10	64		64		
11	65		65		
12	65		65		
13	65	65	65		
14	71		76		
15	85	85	85		
16	85	85	85		
17	85	85	85		
18	85	85	85		
19	85	85	85		
20	85	86	86		
21	86	86	86		
22	86				
23	86	86	86		
24					
25	86	86			
26	85	85	85		
27	86	86	86	Withdrawn— 86	
28	85	85	85		
29	84	84	84		
31	84	84	84		
32	84	84	84		
33	84	84	84		
34	84	84	84		
35	84	84		84	
36	84	84	84		
37					
38					

Ex. No.	*Identified*	*Offered*	*Admitted*	*Rejected*	*Other*
39	84	84	84		
40	83	83	83		
41	83	83	83		
42	83	83	83		
43	92	92	92		
44	122	122	122		
45					
46					
47					
48	95	95	95		
49	95	95	95		
50	97	97	97		
52	98	98		Withdrawn—98	
53	100	100	100		
54	101	102	102		
55	102	102	102		
56	103	103			
57	107	107	107		
58	115	115	115		
59	118	118	118		
60	118	118	118		
61	136				
62	136				
63	136				
64					
65	137				
66	137				
67	137				
68	137				
69	137				
70	137				
71	137				
72	137				
73	137			Withdrawn—103	

Explanatory Note: Since the testimony of the wtnesses was abstracted and certain portions omtted as not germane to the appeal, the prnted transcript is not complete as to exhibits. Appellant makes no assgnment of error on the admisson or rejection of exhbits.